BEFORE THE SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

Investigation Into The Practices Of The National Classification Committee	)	**Ex Parte No. 656 (Sub-No. 1)**

COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE

Thomas O. Barnett
Acting Assistant Attorney General
Antitrust Division

J. Bruce McDonald
Deputy Assistant Attorney General

John R. Sawyer
Economist

Communications with respect to this document should be addressed to:

Donna N. Kooperstein
Chief

William H. Stallings
Assistant Chief

Susan L. Edelheit
Attorney

Transportation, Energy & Agriculture Section
Antitrust Division
U.S. Department of Justice
325 7th Street, N.W.
Suite 500
Washington, D.C. 20530

December 2, 2005

BEFORE THE SURFACE TRANSPORTATION BOARD

WASHINGTON, D.C.

Investigation Into The Practices Of The National Classification Committee	)	**Ex Parte No. 656 (Sub-No. 1)**

COMMENTS OF THE
UNITED STATES DEPARTMENT OF JUSTICE

On October 12, 2005, the Surface Transportation Board ("STB") opened this proceeding to further investigate the freight classification practices of the National Classification Committee ("NCC") and the merits of renewing its antitrust immunity. This proceeding extends the review of the NCC and the regional motor carrier bureau agreements initiated by the STB on December 13, 2004, pursuant to the statutory requirement of 49 U.S.C. § 13703(c). The Department urges the STB to terminate antitrust immunity for both the NCC and the rate bureaus.

Since the enactment of the Motor Carrier Act of 1980 (MCA of 1980), and continuing with the Transportation Industry Regulatory Reform Act of 1994 (TIRRA) and the Interstate Commerce Commission Termination Act of 1995 (ICCTA), Congress has made it clear that the trucking industry should move from a regulated environment toward a reliance on competitive forces. Great strides have been made toward achievement of that goal. Statutory changes have lessened the scope of antitrust immunity and the industry relies more on independent action and negotiated discounts in setting rates.

With greater reliance on competition and less on regulation, it is appropriate to remove these last historical remnants of the once-pervasive regulatory scheme. Collective ratemaking is not in the public interest, and therefore antitrust immunity for the practice should be eliminated. A freight classification system may be designed and implemented in a way that is procompetitive and consistent with the antitrust laws, particularly if it is not part of an immunized ratemaking regime.

Background

Under the immunized NCC agreement, motor carriers maintain and publish a standardized system of freight classification known as the National Motor Freight Classification ("NMFC"). The NMFC classifies all commodities on the basis of four characteristics that are related to the cost of transport: product density, stowability, handling, and liability characteristics. The NMFC classifies many thousands of commodities into 18 product classes ranging from the least costly to transport (class 50) to the most costly to transport (class 500).

The regional rate bureaus currently operate through immunized agreements under which they collectively set general rate increases ("GRIs"). They have antitrust immunity to agree on joint-line rates and to engage in tariff publishing and other information dissemination activities. The rate bureaus use the NCC's classifications for their tariffs (class tariffs) and adjust the tariffs based on the collectively agreed-upon GRI. The class tariffs generally become the "baseline" or benchmark rates for most shipments, since carriers and shippers often negotiate discounts that are expressed as a percentage of these tariffs.

Discussion

Throughout most of the U.S. economy, market forces primarily determine what goods and services are produced and what prices are charged. The antitrust laws are designed to prevent restraints of trade, resting on "the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . ." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

Since this market system has served our economy well, grants of immunity should be rare. The characteristics of the motor carrier industry do not merit an exception to this general rule.[1] Antitrust immunity for rate bureaus to collectively negotiate and set GRIs serves no beneficial purpose and likely leads to prices above competitive levels. The rate bureau provides motor carriers with an otherwise unavailable forum in which they can freely meet with their competitors, exchange cost information, discuss preferences on prices, resolve differences among firms, and agree to raise rates across the board through a GRI. These communications inevitably lessen price competition among the carriers and may also reduce competition on non-price terms.

Even though the motor carriers no longer have immunity to explicitly agree on the actual rates that they will charge, the class tariffs, with the collectively-determined GRI, give all trucking firms a "benchmark" rate. The mere existence of such a benchmark may give each firm greater reason to expect that its rivals will select a price increase in line with GRIs. Firms may thus increase their rates in anticipation that others will do likewise, calculating that such an

---

[1] Some proponents of antitrust immunity have noted the participation of many small and medium size firms and the advantages in certain circumstances of interlining among less-than-truckload ("LTL") carriers. But there are many sectors of the economy in which smaller firms successfully compete and in which firms engage in cooperative activity, all without the benefit of antitrust immunity.

accommodation is their best long-run strategy. By serving as such a focal point for pricing decisions, GRIs promote a higher market price than would otherwise result. And, despite the proponents' arguments, the presence of discounting does not mean that shippers and final consumers will not be harmed. Even within cartels that are quite successful in raising average transaction prices, occasional and even systematic discounting is not uncommon. Indeed, the STB has found that some shippers pay above-market rates despite widespread discounting.[2]

Rates in the trucking industry should be determined through the market interplay of individual buyers and sellers, each acting in its own independent self interest, just as prices and rates are determined in most other sectors of the economy. Eliminating antitrust immunity for collective ratemaking should advance this goal. Since collective ratemaking constitutes a horizontal agreement among rivals whose essential purpose is to set prices, exposure to the antitrust laws almost certainly would end all collective ratemaking by the rate bureaus. It is likely to be viewed as a *per se* antitrust violation, a practice that "would always or almost always tend to restrict competition and decrease output . . . ." *Broadcast Music, Inc., v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). Thus, the likely effect of declining to renew antitrust immunity for collective ratemaking would be increased competition that would lead to lower rates.[3]

---

[2] *EC-MAC Motor Carriers Serv. Ass'n*, 3 S.T.B. 926, 930-33 (1998) ("*1998 Decision*"); *EC-MAC Motor Carriers Serv. Ass'n*, 4 S.T.B. 503, 507-09 (2000).

[3] The Department has previously urged the STB not to renew the agreements of seven regional rate bureaus. See Comments of the United States Department of Justice, *EC-MAC Motor Carriers Serv. Ass'n, Inc.*, filed August 18, 1997 ("1997 Comments"). *See also Central & Southern Motor Freight Tariff Ass'n, Inc. v. U.S.*, 777 F.2d 722, 730 (D.C. Cir. 1985).

Unlike collective ratemaking, however, removing antitrust immunity for the NMFC need not eliminate freight classification. A classification system provides useful information concerning the transportation characteristics of commodities. Such a system could benefit both carriers and shippers, and could be designed in a way that would be consistent with the antitrust laws. The STB has previously recognized the benefits of standardized freight classification, finding that it may help carriers reduce costs and price their services more efficiently.[4] A system such as the NCC's National Motor Freight Classification creates a framework of reference that can simplify the process of quoting and negotiating rates for those who use it. Legality of the classification system would depend on all relevant circumstances, including the methods used for classification, the factors considered, the decisionmaking process, and whether immunity for collective ratemaking is renewed.[5]

Antitrust immunity should not be extended simply because the motor carriers suggest that fear of liability would cause them to discontinue the NMFC. *See* Comments of National Motor Freight Traffic Association and National Classification Committee, Statement of William W. Pugh at 14-15. There is no reason to shield an otherwise procompetitive system from antitrust scrutiny or to treat this industry differently from others in which classification systems or standards are routinely implemented. All prudent businesses devote some concern to antitrust liability, and this awareness helps to ensure that their ventures are structured in a way that

---

[4] *National Classification Committee -- Agreement*, 3 S.T.B. 917, 921 (1998).

[5] Analysis of the NMFC could be complicated if immunity for the rate bureaus (but not the NCC) were renewed. In an environment of collective ratemaking, a standardized freight classification might further facilitate cartel pricing by reducing the number of rates to be set down to a more manageable number. It might also impair the ability of individual carriers to cheat on cartel pricing through secret, unilateral freight reclassification.

minimizes competitive harm. If the NCC were to desire greater certainty regarding potential liability, it could take advantage of the Antitrust Division's business review procedure, under which businesses may seek to ascertain the Division's present enforcement intentions regarding proposed business conduct. 28 C.F.R. § 50.6 (2005).[6]

Other bureau practices also likely would withstand antitrust scrutiny, especially if they are structured so as not to restrict competition.[7] For example, Southern Motor Carriers Rate Conference ("SMC") aggregates cost data to prepare a "Carrier Cost Index." Compilation and publication of aggregated industry data, including measures of costs and independently established rates, can improve the performance of competitive markets by enhancing the information available to market participants. The reporting of aggregated industry data is commonplace and, assuming the absence of collective pricing activity, is typically viewed as benign.[8]

Similarly, motor carriers likely could continue to negotiate interline rates. LTL motor carriage is a network industry in which interlining serves a competitive purpose. Typically, participating carriers that jointly offer a through route for a particular shipment are appropriately

---

[6] For example, on November 15, 2002, the Antitrust Division issued a favorable business review letter to the American Trucking Association, which proposed to develop and disseminate a model contract. The Division noted that the availability of standardized language could contribute to efficient contract negotiations. Business review letters are publicly available and can be viewed at http://www.usdoj.gov/atr/public/busreview/letters.htm.

[7] As the STB has noted, "any procompetitive services that the bureaus provide -- i.e., any services other than collective ratesetting -- do not violate the antitrust laws and thus do not require antitrust immunity." *1998 Decision,* 3 S.T.B. at 931, note 15.

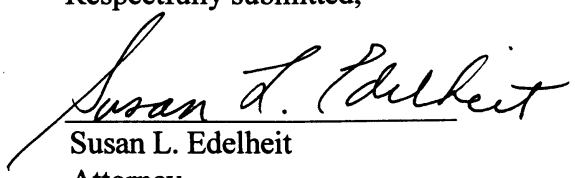
[8] See *1997 Comments* at 12-14. The Antitrust Division also gave a favorable business review letter to the Truckload Carriers Association (TCA) regarding its proposal to periodically collect cost and performance data from individual carriers, publish the results in aggregated form, and develop best-practice recommendations. Business review letter of March 27, 2001.

viewed as partners rather than as competitors. Their ability to negotiate interline rates with one another would not be eliminated by exposure to the antitrust laws. As the STB has recognized, nothing in the antitrust laws bars motor carriers from establishing joint-line rates or dividing revenue for interline movements. See *1998 Decision*, 3 S.T.B. at 931, note 16.

Conclusion

The current system in which various bureaus engage in collective activities under the protection of antitrust immunity is no longer justified from a public interest perspective. It is the historical remnant of regulation and gradual deregulation. Renewal of antitrust immunity for any and all motor carrier agreements, including that of NCC, would prolong a regime in which shippers are denied the full benefits of a more competitive marketplace. The Department of Justice respectfully urges the STB to withdraw immunity from the regional rate bureaus and the NCC.

Respectfully submitted,



Thomas O. Barnett
Acting Assistant Attorney General

J. Bruce McDonald
Deputy Assistant Attorney General

Donna N. Kooperstein
Chief

William H. Stallings
Assistant Chief

Susan L. Edelheit
Attorney

John R. Sawyer
Economist

Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530

December 2, 2005